STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 7, 2011
v	No. 295831 Kent Circuit Court
STEVEN ALAN MOSHER, Defendant-Appellee.	LC No. 09-03382FH

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant was convicted by jury of one count of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a. The trial court sentenced defendant to a probationary period of 42 months and required that he register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* He now appeals as of right. We affirm.

In late December 2008, at a family gathering, defendant made a sexual gesture and comment to his then 14-year-old younger brother. The brother wanted to borrow defendant's video game system. Defendant ignored his brother. His brother followed defendant as far as the hallway leading into defendant's room, at about a distance of ten to twelve feet. His brother continued to ask defendant to use the video game. Defendant looked at his brother and asked, "[D]o you want to do it?" while making a masturbatory gesture with his hand.

Before trial, the prosecution filed a notice of intent to use other acts evidence pursuant to MRE 404(b) and MCL 768.27(a). The prosecution offered as evidence statements made by defendant in his 2005 juvenile adjudication for gross indecency between males (MCL 750.338) against his brother to help prove defendant's intent to commit the instant offense. In November, 2005, when the brothers were 11 years old and 14 years old, the boys' mother found out about sexual abuse that had been going on for a "year or two." Defendant would initiate sexual contact in various rooms of their home by asking his brother if he would "want to do it." At trial, the brother testified that he understood defendant's utterance, "do it" to mean using his hands to masturbate defendant and "ejaculate him." Defendant opposed the motion to admit evidence of these other acts. The trial court found that the prior juvenile adjudication was relevant to prove intent.

The jurors were instructed to limit the scope of the prior act evidence to the purpose of establishing intent. At the conclusion of trial, the jury found defendant guilty as charged.

Defendant argues that the trial court erred in allowing evidence of defendant's previous offense pursuant to MCL 768.27a, and that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. We disagree.

"A trial court's admission of other-acts evidence is reviewed for an abuse of discretion." *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). An abuse of discretion occurs when the trial court "chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCL 750.145a provides:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both.

There is no dispute that defendant made a masturbatory gesture to his minor brother and asked him, "[D]o you want to do it?" The issue in this case is whether defendant possessed the intent to accost his brother for an immoral purpose. The prosecution argued that he did, as evidenced by the fact that in his past sexual encounters with his brother, he used the same phrase to initiate the sexual contact. Defendant argued that he was merely attempting to get his younger brother to leave him alone about the video game and did not intend the gesture and comment to be taken as an invitation to engage in a sexual act.

MCL 768.27a provides, in relevant part:

> (1) [I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act [SORA], 1994 PA 295, MCL 28.722.

This statute "allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)." *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). The statutory provision permits the introduction of evidence that previously would have been inadmissible as "it allows what may have been categorized as propensity evidence to be admitted[.]" *Id.* at 619. MCL 768.27a

"reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." *Id.* at 620. Having a complete picture of a defendant's history can shed light on the likelihood that a given crime was committed. *Id.*

There is no question that under MCL 768.27a, defendant's prior adjudication was admissible. However, MCL 768.27a(1) also expressly requires the evidence to be relevant, and this Court in *Pattison* stated that MRE 403 must be considered. *Pattison*, 276 Mich App at 621. Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "From every statement or piece of evidence admitted there is likely to be some prejudicial effect." *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003). "A determination of the prejudicial effect of evidence is best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony by the trial judge." *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003) (quotation marks and citations omitted).

In this case, the evidence demonstrated that defendant had initiated sexual contact with the victim in precisely the same manner in the past, and thus supported the prosecution's theory that defendant was soliciting sexual contact from his brother. Therefore, the challenged evidence was highly probative of the intent element of enticing or soliciting a minor for immoral purposes. MCL 750.145a.

Unfair prejudice refers to the tendency of evidence to adversely affect a defendant's position by injecting extraneous considerations such as jury bias, sympathy, anger, or shock. *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). While the other acts evidence at issue here was prejudicial, we find that it was not unfairly prejudicial, nor was its probative value substantially outweighed by the danger of unfair prejudice. As stated by our Supreme Court in *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973), "it has been held that the probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." "'[S]uch previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction—a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction.'" *Id.* at 414, quoting *People v Jenness*, 5 Mich 305, 323 (1858)(emphasis omitted); see also *People v Dobek*, 274 Mich App 58, 88-89; 732 NW2d 546 (2007).

In this case, defendant's past conduct was highly relevant to the issue of intent. The jury could not have understood why defendant's comment and action could be considered a crime without knowing about the past sexual offense and how defendant had initiated sexual encounters with his brother in the past.

Finally, the trial court gave a limiting instruction to the jury, admonishing them to only consider the 2005 incidents as evidence of defendant's intent in this case, and not to convict defendant solely based on his guilt of the 2005 crime. "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We conclude that the trial court did not err in allowing evidence of defendant's previous offense under MCL

768.27a and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ William C. Whitbeck
/s/ Donald S. Owens